No. 80-1864

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MOBIL OIL CORP., ATLANTIC RICHFIELD CO., GULF OIL CORP., UNITED REFINING CO., CHEVRON U.S.A. INC., AMOCO OIL CO., TEXACO INC. and EXXON CORP.,

Respondents,

—v.—

JAMES H. TULLY, JR., THOMAS H. LYNCH, and FRANCIS KOENIG, constituting the New York State Tax Commission; ROBERT ABRAMS, Attorney General of the State of New York; and JAMES L. LAROCCA, Commissioner of the New York State Energy Office,

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NEW ENGLAND PETROLEUM CORP.,

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—v.—

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' JOINT BRIEF IN OPPOSITION

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Counterstatement of Questions Presented

1. Did the courts below correctly conclude that the Tax Injunction Act, 28 U.S.C. § 1341, did not bar federal jurisdiction to adjudicate the constitutionality of New York State's effort to regulate petroleum product prices by virtue of an "anti-pass through" provision contained in a statute imposing a gross receipts tax where (a) respondents did not seek to "enjoin, suspend or restrain the assessment, levy or collection" of the tax itself, and (b) the only arguable interference with state tax collection was the self-inflicted result of the New York legislature's own "calculated decision" to link the survival of the tax to the validity of its attempt at price control?

2. In any event, was the Tax Injunction Act inapplicable because the District Court had *exclusive* jurisdiction over respondents' preemption claims by virtue of § 211(a) of the Economic Stabilization Act of 1970, as incorporated by reference in § 5(a) of the Emergency Petroleum Allocation Act, 15 U.S.C. § 754(a), so that there was no "plain, speedy and efficient" state court remedy available to respondents—an alternative basis supporting the judgment below on which the Petition is totally silent?

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RESPONDENTS' JOINT BRIEF IN OPPOSITION

Respondents[1] respectfully submit that the instant Petition fails to present a single "special and important reason" warranting the issuance of a writ of certiorari. *See* Sup. Ct. Rule 19.

Despite petitioners' claim that the judgment below raises a "significant and recurrent issue" (Petition at 5), precisely the opposite is true. Whether the Tax Injunction Act applies in the peculiar circumstances of this case has absolutely no significance beyond the narrow confines of this litigation. What New York has attempted in this case is not simply to assess, levy and collect a tax—something which is not attacked here—but to go beyond its taxing authority to prevent the taxpayer from passing on the cost of the tax in the prices it charges for its products, and then to specify that if the "anti-pass through" provision is held invalid—as the District Court has ruled—the tax itself must fall. We are aware of no other example of a state making such a "calculated decision" to link the survival of a tax to the validity of a price control measure, and there is no reason to suppose that any other state will adopt such a statutory linkage in the future—which means that there is no reasonable prospect that the § 1341 issue presented by this case is "likely to recur." (Petition at 5). Indeed, Connecticut—the only other state which has even tried to prohibit oil companies from increasing their petroleum product prices to recoup the cost of a gross receipts tax—expressly provided that its tax would continue in effect even if its attempt at price control were declared invalid. *See Mobil Oil Corp.* v. *Dubno,* 639 F.2d 919, 922 (2d Cir. 1981), *petition for cert. pending,* Dkt. No. 80-1813

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[1] Filed herewith under separate cover is a bound Appendix listing, in compliance with Sup. Ct. Rule 28.1, all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of each corporate respondent.

(April 28, 1981). In a word, the issue presented by petitioners is a sport which does not justify the sparing invocation of this Court's extraordinary certiorari jurisdiction.

Moreover, as we demonstrate below, the District Court and the Court of Appeals were eminently correct in rejecting § 1341's applicability in this case. Under that statute's plain language, the District Court was not asked to enjoin the "assessment, levy or collection" of a state tax, and the District Court's order did no such thing—as petitioners themselves were forced to concede. Nor is § 1341's policy against federal interference with state tax collection even remotely implicated here, since it is New York *itself* which has deliberately decided to forego tax revenues if it cannot engage in price control.

Finally, as we shall further demonstrate, there is an alternative ground supporting the judgment below which petitioners wholly ignore: The District Court had *exclusive* jurisdiction over respondents' preemption claims; hence, there was no "plain, speedy and efficient" state court remedy available as required by § 1341. Indeed, the Court of Appeals below implicitly so found in holding that the Temporary Emergency Court of Appeals ("TECA") had exclusive appellate jurisdiction over respondents' preemption claims.

Statement of the Case

On June 18, 1980, New York Governor Hugh Carey signed into law two bills which created a new Section 182 of the New York Tax Law and imposed a 2% tax on the "gross receipts" of oil companies doing business in New York. (N.Y. Tax Law § 182 (McKinney Supp. 1980)). The "tax purpose" of the legislation was to raise revenues for the State's mass transit system. (A.68). However, New York went beyond that purpose by simultaneously enacting in § 182(12)(a) an "anti-pass through" provision which prohibited the oil companies from increasing their New York prices to recoup all or even part of this new tax cost:

> "The tax imposed by this section . . . shall be a liability of the oil company, shall be paid by such company and *shall not be included, directly or indirectly, in the sales price of its products sold in this state.*" (Emphasis added).[2]

Quite obviously, the purpose of the anti-pass through provision was not to raise tax revenues. On the contrary, its express legislative objective—as explicitly set forth in the enactment's "declaration of purpose"—was to control oil company prices so as "to do nothing that will contribute to further *increases in the price of petroleum products* to [New York] consumers" and "to prevent such gross receipts tax from *fueling inflation* by prohibiting the pass through of such tax to the consumers of this state." (1980 N.Y. Laws, ch. 272, § 1; emphasis added). What is more, New York deliberately determined that if it could not control the oil companies' prices, it would forego the gross receipts tax entirely. Thus, the legislature included a "self-destruct" clause, which provides that if the anti-pass through prohibition is held to be invalid, the tax itself "shall cease to be in force and effect" ten days thereafter. (1980 N.Y. Laws, ch. 272, § 5).

In July 1980, respondents instituted these proceedings in the Northern District of New York, alleging that the anti-pass through provision (1) was preempted by the Emergency Petroleum Allocation Act ("EPAA"), 15 U.S.C. §§ 751-760h, and the Mandatory Petroleum Price Regulations promulgated thereunder; and (2) violated the Commerce and Due Process Clauses of the United States Constitution. As the District Court correctly noted, respondents "are not challenging the validity of [New York's] gross receipts tax nor are they attacking the statutorily prescribed administrative procedure for assessing, levying or collecting the tax" (A.16); rather, "they

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2 Companies that are found to have passed on the cost of the tax through product prices are subject to a penalty equal to 100% of the tax liability for the year in which the violation occurs. (N.Y. Tax Law § 182(12)(b)(2)).

challenge only the anti-pass through provision of § 182 (12)(a)." (A.11). Indeed, petitioners themselves conceded as much. Thus, the New York State Commissioner of Taxation and Finance admitted that respondents "do not challenge the imposition of the tax, or the rate of the tax, or the allocation formula or the collection of the tax." (A.69-70).

Nevertheless, petitioners moved to dismiss respondents' limited challenge to the anti-pass through provision on the ground that federal jurisdiction was barred by the Tax Injunction Act, 28 U.S.C. § 1341. That statute provides:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

In support of their motion, petitioners advanced the same simplistic argument that they continue to press in this Court—that, by virtue of the New York legislature's deliberate decision to link the survival of its gross receipts tax to the validity of its price control effort, "if respondents are successful in their attack upon the anti-pass through provision, the tax imposed by New York Tax Law, § 182 will cease to exist." (Petition at 7).

The District Court's Decision

The District Court, in a thoroughly considered opinion, rejected petitioners' tortured application of § 1341. After "carefully review[ing] the statutory language," Judge McCurn concluded that "the anti-pass through provision is a price control measure, rather than a rule of tax incidence"—as petitioners had sought to characterize it—and that "the 'self-destruct' mechanism contained in the legislation indicates an intent on the part of the state legislature to impose the gross receipts tax on oil companies *only* if it can in addition impose controls on the prices charged by the companies for products sold in New York State." (A.16-17; emphasis in original). In the District Court's view, that deliberate decision by New York to "inextricably link" the survival of a tax to the validity of a

state price control measure provided no basis for the application of § 1341. (A.18-19). As Judge McCurn put it:

> "[T]he Legislators anticipated that the anti-pass through provision of the legislation might be challenged, *apart from any attack on the tax itself,* and that it might be struck down by the Courts *with no threat to the continued collection of the tax.* The fact that the State *chose* to make the taxes' [sic] survival dependent upon the survival of a provision which constitutes an exercise of the State's police power rather than its taxing power does not, in the opinion of this Court, justify the application of the Tax Injunction Act." (A.18; emphasis added).

The District Court went right to the heart of the matter when it wrote:

> "[*B*]*ut for the 'self-destruct' mechanism* included in the legislation, a determination by this Court invalidating the anti-pass through provision *would have absolutely no affect* [sic] *on the 'assessment, levy or collection' of the gross receipts tax.* 28 U.S.C. § 1341." (A.6; emphasis added).[3]

Having denied petitioners' motion to dismiss under § 1341, the District Court went on to grant respondents summary judgment on their preemption claims, holding that the anti-pass through provision was in direct conflict with the EPAA and the price regulations promulgated thereunder and was thus void under the Supremacy Clause of the United States Constitution. (A.20-54).

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3 In light of its holding that the suit was not one to enjoin the assessment, levy or collection of a state tax, the District Court found it unnecessary to reach respondents' alternative argument that § 1341 did not apply because the federal courts had *exclusive* jurisdiction over their preemption claims, so that they had no "plain, speedy and efficient" state court remedy. (A.13).

The Court of Appeals' Decision

Petitioners appealed both the § 1341 and the preemption rulings to the Court of Appeals for the Second Circuit. That Court affirmed as to the former and dismissed the appeal of the latter on the ground that, as respondents had urged, TECA had exclusive appellate jurisdiction over the preemption issues.[4] In this Court, petitioners seek review only of the § 1341 affirmance.

Like the District Court, the Second Circuit was unimpressed with petitioners' argument that, by virtue of the self-destruct clause, the New York legislature could somehow convert respondents' limited challenge to the anti-pass through provision into an attack on the gross receipts tax itself. As Judge Mulligan put it:

> "While the statutory linkage between the validity of [the anti-pass through] provision and the continued existence of the tax does result in the frustration of the State's power to collect the tax, *this was the calculated decision of the legislature and not the result of the [district] court's determination.*" (A.67; emphasis added).

That respondents were not attacking the "assessment, levy or collection" of the gross receipts tax was "bolstered" by an affidavit filed by the New York State Commissioner of Taxation and Finance in which he conceded that respondents " 'do not challenge the imposition of the tax, or the rate of the tax, or the allocation formula or the collection of the tax,' " and that the anti-pass through provision " 'is all that the [district] court enjoined.' " (A.69-70).

Nor was the Second Circuit persuaded that the anti-pass through provision was a "rule of tax incidence" which could not be enjoined by a federal court under § 1341. Unques-

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4 Having filed a protective notice of appeal with TECA, petitioners then sought review of the preemption issues in that Court. The matter has been fully briefed and argued and is now *sub judice.*

tionably, New York had the right to place the "legal incidence" of the tax upon the oil companies; but it was "an entirely different matter for the legislature to instruct the person taxed that he cannot raise resources to pay the tax by increasing the price of his product." (A.68).

> "*This objective is certainly not an exercise of a taxing power but a police power affecting the price structure of petroleum products.* We agree that the State has the right to place the legal incidence of the tax upon the oil companies; it has selected its target. But in barring the targets of the tax from recovering their costs from the consumer directly or indirectly, *the State has gone beyond its taxing power and has employed its police powers.* . . . We simply hold that that action is not insulated from federal scrutiny by Section 1341." (A.68-69; emphasis added).

Accordingly, the Second Circuit had no occasion to expressly address respondents' alternative ground for affirmance (A.70)—that the District Court had *exclusive* jurisdiction over their preemption claims by virtue of § 211 of the Economic Stabilization Act of 1970, as incorporated by reference in § 5(a) of the EPAA; and, hence, that there was no "plain, speedy and efficient" state court remedy available as required by § 1341. Nevertheless, the Court of Appeals implicitly so found in holding that, under the same statutes, TECA had *exclusive* appellate jurisdiction over the preemption issues. (A.61-64). Petitioners have not addressed this alternative basis for affirming the denial of their § 1341 motion.

REASONS FOR DENYING THE WRIT

I. The Issue Sought To Be Reviewed Has No Immediate Importance Beyond The Peculiar Circumstances Of This Case

Over thirty years ago, Chief Justice Vinson succinctly articulated this Court's certiorari function:

> "If we took every case in which an interesting legal question is raised, or our *prima facie* impression is that the decision below is erroneous, we could not fulfill the Constitutional and statutory responsibilities placed upon the Court. *To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved.*" (Emphasis added).[5]

Patently, this case does not meet that standard. Petitioners' § 1341 argument rests upon the New York legislature's "calculated" linkage between the validity of its non-revenue price control measure and the continued existence of its gross receipts tax—a wholly unique circumstance which has no counterpart in any piece of state tax legislation of which we are aware. Indeed, as already noted, Connecticut—the only other state which has even sought to impose an anti-pass through provision on the oil industry—expressly provided that its gross receipts tax would continue in effect even if its attempt at price regulation were struck down—which is precisely what has happened. *See Mobil Oil Corp.* v. *Dubno,* 639 F.2d 919, 922 (2d Cir. 1981), *petition for cert. pending,* Dkt. No. 80-1813 (April 28, 1981).[6] Thus, the issue presented for review by

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5 Address before the American Bar Association, Sept. 7, 1949, 69 S. Ct. v, vi.

6 The *Dubno* petition raises several issues for review which are not presented by New York, including whether the district court there correctly rejected the abstention doctrine. Petitioners' sole § 1341

(Footnote continued)

petitioners has no significance beyond the peculiar facts of this case. Whether the courts below properly rejected § 1341's applicability on those facts—and we submit they unquestionably did—simply does not merit the exercise of this Court's certiorari jurisdiction.

II. The Courts Below Correctly Held That Respondents Did Not Seek To Enjoin The "Assessment, Levy Or Collection" Of New York's Gross Receipts Tax And That Therefore § 1341 Was Inapplicable

A. The Plain Language Of § 1341 Precludes Its Application In This Case

In determining the coverage of any enactment, this Court has repeatedly held that "[t]he starting point of our inquiry is the plain language of the statute itself." *Rosewell* v. *LaSalle Natl. Bank,* 101 S. Ct. 1221, 1228 (1981); *Reiter* v. *Sonotone Corp.,* 442 U.S. 330, 337 (1979). In this case, that is both the beginning and the end of the inquiry, since the plain language of § 1341 precludes its application to respondents' limited challenge to the anti-pass through provision.

By its very terms, § 1341 strips a federal district court of jurisdiction *only* where it is asked to "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law" (provided that a "plain, speedy and efficient" remedy exists in the state courts).[7] Here, however, as petitioners themselves conceded below, respondents sought no such relief. To quote Tax Commissioner Tully, respondents "do not challenge the imposition of the tax, or the rate of the tax,

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argument in *Dubno*—that Connecticut's anti-pass through provision represents an "assessment" of that state's gross receipts tax, albeit an admittedly "untraditional" one (*Dubno* Petition at 21)—does not and cannot rely on the existence of a self-destruct clause, because the Connecticut law expressly included a severability provision.

7 Section 1341 applies to declaratory judgments as well as injunctions. Great Lakes Dredge and Dock Co. v. Huffman, 319 U.S. 293, 299 (1943).

or the allocation formula or the collection of the tax." (A.70). What is more, petitioners admitted that the District Court did not enjoin any of the "provisions of the [gross receipts] tax statute that create the tax liabilities"; in Mr. Tully's words, the anti-pass through provision "is all that the court below enjoined." (A.70). Accordingly, under the plain language of § 1341, respondents did not ask a federal court to "enjoin, suspend or restrain the assessment, levy or collection" of New York's gross receipts tax, and the District Court's judgment did no such thing. On its face, therefore, the Tax Injunction Act is inapplicable.

It is sheer sophistry to argue that, solely by virtue of the New York legislature's self-destruct proviso, the District Court's limited injunction of the anti-pass through provision was converted "as a matter of law" into an order enjoining "the assessment, levy or collection" of the gross receipts tax within the meaning of § 1341. (Petition at 7-8). What petitioners are confusing is a judicial decree declaring the gross receipts tax itself invalid for some constitutional infirmity—which § 1341 would foreclose—and New York's own "calculated decision" (A.67) to make the tax inoperative if the anti-pass through provision were struck down.

The proof of the pudding is this: If respondents' preemption attack on the anti-pass through provision is upheld by TECA, the District Court's judgment enjoining its enforcement would leave New York entirely free to collect the tax if the State wanted to do so. The fact that New York has deliberately chosen not to—by enacting a self-destruct clause—is a matter of the State's own doing, not the respondents' and not the District Court's. To hold that such a self-inflicted disruption of revenue collection does not oust a federal court of jurisdiction is hardly a "begrudging interpretation" of § 1341. (Petition at 8). On the contrary, it is in complete harmony with the statute's plain language.

Petitioners' effort to characterize the anti-pass through provision as "an element of the State's taxing power" (Petition at

7) is to no avail. Apart from the self-destruct mechanism, the anti-pass through provision has nothing whatever to do with the "assessment, levy or collection" of the gross receipts tax—which, after all, is what § 1341 is all about. The tax is indisputably "assess[ed]" and "lev[ied]," not by the anti-pass through provision, but by § 182(1) of the Tax Law, which "imposes" an "annual tax . . . upon every oil company equal to two percentum of its gross receipts"; and the tax is "collect[ed]" from the oil companies pursuant to § 182(6).

What the anti-pass through provision does do, purely and simply, is to *control prices* by prohibiting the oil companies from passing on any of the cost of the new tax which New York has imposed on them "in the sales price of [their] products sold in this state." Petitioners themselves admit as much when they state that "[t]he purpose of the anti-pass through provision is . . . to prevent the tax on oil companies from *fueling inflation*." (Petition at 7; emphasis added). Quite obviously, the only way that this can be accomplished is by controlling the oil companies' prices; and that is precisely what the anti-pass through measure does.[8] Indeed, the prohibition is squarely predicated on the assumption that, in its absence, the oil companies would as a matter of course raise their petroleum product prices in New York to recapture the cost of the gross receipts tax.[9] Otherwise, the provision would have been an exercise of legislative superfluity. The Second Circuit thus correctly concluded that the anti-pass through provision "is not an exercise of taxing power of the State within Section 1341 but rather of its police powers directed to its express concern about inflation and rising fuel costs." (A.70).

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8 The fact that New York has controlled only one element of the respondents' prices and not actually fixed their "price levels" (Petition at 7) is beside the point. For, as this Court has long recognized, price regulation includes any form of artificial "market manipulation" which "prevents the determination of . . . prices by free competition alone." United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

9 As this Court pointed out in Gurley v. Rhoden, 421 U.S. 200, 204 (1975), "[t]he economic burden of taxes incident to the sale of merchandise is traditionally passed on to the purchasers of the merchandise."

B. Neither The Case Law Under § 1341, Nor The Statute's Underlying Purpose, Supports Its Application In This Case

Not surprisingly, there is no case supporting petitioners' strained reading of § 1341. None of the cases in which that statute has been successfully invoked even remotely resembles the present situation. As the District Court noted (A.14-15), they typically involve attacks on the constitutionality or validity of the state tax itself,[10] or efforts to enjoin or declare invalid the state's procedures for collecting or determining the amount of the tax or otherwise preventing the state from exercising its collection power.[11]

Petitioners' reliance on *Mandel* v. *Hutchinson*, 336 F. Supp. 772 (C.D.Cal.1971), *aff'd*, 494 F.2d 364 (9th Cir. 1974), is totally misplaced. (Petition at 8). At issue in *Mandel* was whether a taxpayer, a veteran but a *nonresident* of California, was nevertheless entitled to a property tax exemption accorded *resident* veterans by California law on the theory that the residency requirement violated the federal Constitution. As the district court's opinion makes clear, the relief sought was squarely directed against the tax itself:

> "Plaintiff seeks to permanently enjoin the enforcement of the residency requirement by restraining the Assessors

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10 *See, e.g.*, King v. Sloane, 545 F.2d 7 (6th Cir. 1976); Hickman v. Wujick, 488 F.2d 875 (2d Cir. 1973); First United Methodist Church of Syracuse v. City of Syracuse, 489 F.Supp. 185 (N.D.N.Y. 1980); 57th Street Management Corp. v. City of New York, 456 F.Supp. 286 (S.D.N.Y. 1978); Evangelical Catholic Communion, Inc. v. Thomas, 373 F. Supp. 1342 (D. Vt. 1973), *aff'd mem.*, 493 F.2d 1397 (2d Cir. 1974); Mandel v. Hutchinson, 336 F.Supp. 772 (C.D.Cal. 1971), *aff'd*, 494 F.2d 364 (9th Cir. 1974); American Commuters Association v. Levitt, 279 F.Supp. 40 (S.D.N.Y. 1967), *aff'd*, 405 F.2d 1148 (2d Cir. 1969).

11 *See, e.g.*, Ludwin v. City of Cambridge, 592 F.2d 606 (lst Cir. 1979); Huber Pontiac, Inc. v. Whitler, 585 F.2d 817 (7th Cir. 1978); Coon v. Teasdale, 567 F.2d 820 (8th Cir. 1977); Czajkowski v. State of Illinois, 460 F.Supp. 1265 (N.D.Ill. 1977), *aff'd mem.*, 588 F.2d 839 (7th Cir. 1978); Green v. Klinkofe, 422 F.Supp. 1021 (N.D.Ind. 1976); Kimmey v. H.A. Berkheimer, Inc., 376 F.Supp. 49 (E.D.Pa. 1974), *aff'd mem.*, 511 F.2d 1394 (3d Cir. 1975).

> from denying the exemption to any veteran, and by enjoining the Tax Collectors from collecting the taxes due from that Class of veterans held non-exempt because of failure to meet the residency requirement." (336 F.Supp. at 775).

In short, as is self-evident, Mandel's attack was directly aimed at *the state's ability to impose a tax on him and other nonresident veterans.* It was in that sense that the district court noted, quite properly, that there was "a direct relationship between the enforcement of the residency requirement and the amount of taxes collected." (*Id.* at 779).[12] There is, however, no parallel here, since—as petitioner Tully has admitted—respondents are *not* challenging New York's legal ability to impose a gross receipts tax on them.

Nor does *Czajkowski* v. *State of Illinois,* 460 F.Supp. 1265 (N.D.Ill. 1977), *aff'd mem.,* 588 F.2d 839 (7th Cir. 1978), support petitioners' contention. (Petition at 8-9). In that case, plaintiffs demanded "an injunction preventing the state from expending any funds to enforce the Act against them"—relief which the court viewed as equivalent to enjoining the collection of the tax itself, since "[t]he state obviously cannot collect a tax when it has no funds for enforcement." (460 F.Supp. at 1272).

Unaided by the Tax Injunction Act's plain language or a single apposite authority justifying its application here, petitioners purport to glean from § 1341 a sweeping purpose to preclude federal injunctive relief in all "state tax matters" so long as adequate state remedies exist. (Petition at 5). But that argument proves too much. The jurisdictional barrier erected by § 1341 is coextensive with its unambiguous language. If the suit in question does not seek to have the court "enjoin, suspend or restrain the assessment, levy or collection" of a

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12 The sole purpose of Mandel's suit was to reduce the amount of revenues collected by the state by making the tax exemption applicable to him and other similarly situated nonresident veterans. As the Ninth Circuit itself characterized Mandel's complaint, it was one for "tax relief." (494 F.2d at 365).

state tax, there is no bar to federal jurisdiction simply because what is involved, broadly speaking, is a "state tax matter." The numerous cases rejecting the application of § 1341 and exercising federal jurisdiction in such "tax matters" (irrespective of the existence of a plain, speedy and efficient alternative state remedy) amply attest to that fact.[13]

In sum, the Court of Appeals correctly concluded that § 1341 did not deprive the District Court of jurisdiction to adjudicate the validity of the anti-pass through provision, even assuming the availability of a plain, speedy and efficient state court remedy. That decision does no more than apply the plain language of the statute to the particular facts of this case, and does not merit this Court's attention. Furthermore, as we shall now demonstrate, *no* state remedy in fact existed with respect to respondents' preemption claims.

III. Since The District Court Had *Exclusive* Jurisdiction Over Respondents' Preemption Claims, There Was No State Court Remedy As Required By § 1341

Petitioners' § 1341 argument proceeds on the tacit assumption that a "plain, speedy and efficient" state court remedy existed for the adjudication of respondents' attack on the anti-pass through provision. That assumption, however, is

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13 E.g., Moe v. Salish and Kootenai Tribes, 425 U.S. 463, 474-75 (1976); Department of Employment v. United States, 385 U.S. 355, 358 (1966); Wells v. Malloy, 510 F.2d 74 (2d Cir. 1975); Hargrave v. McKinney, 413 F.2d 320, 326 (5th Cir. 1969); United States v. Arlington County, 326 F.2d 929, 931 (4th Cir. 1964); Matter of Estate of Novotny, 446 F.Supp. 1027, 1030-31 (S.D.N.Y. 1978); National Carriers' Conference Committee v. Heffernan, 440 F.Supp. 1280, 1284 (D.Conn. 1977); Louisville & Nashville Railroad Co. v. Atkins, 390 F.Supp. 576, 578 (M.D.Tenn.), *aff'd mem.*, 423 U.S. 802 (1975); Baker v. Strode, 348 F.Supp. 1257, 1263 (W.D.Ky. 1971); Parker v. Mandel, 344 F.Supp. 1068, 1072-73 (D.Md. 1972); Georgia Pacific Corp. v. County of Mendocino, 340 F.Supp. 1061, 1065 (N.D. Cal. 1972), *supp. op.*, 357 F.Supp. 380 (N.D. Cal.1973), *aff'd*, 515 F.2d 285 (9th Cir. 1974); Southland Mall, Inc. v. Garner, 293 F.Supp. 1370, 1371 (W.D.Tenn. 1968); Kerr v. Enoch Pratt Free Library of Baltimore City, 54 F.Supp. 514, 527 n.3 (D.Md. 1944), *rev'd on other grounds*, 149 F.2d 212 (4th Cir.), *cert. denied*, 326 U.S. 721 (1945).

unfounded. Indeed, there was *no* state court remedy available with respect to respondents' preemption claims since the District Court had *exclusive* jurisdiction over them. Petitioners utterly fail to address this alternative basis for the judgment below—despite the fact that the issue was fully briefed by both sides in the District Court and the Court of Appeals, and despite the fact that the Second Circuit implicitly resolved it in respondents' favor in holding that TECA had exclusive appellate jurisdiction over the preemption claims.

Section 211 of the Economic Stabilization Act of 1970 ("ESA"), reprinted in the notes following 12 U.S.C. § 1904, was enacted by Congress in the Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, § 2, 85 Stat. 743 (1971). Section 211(a) declared:

> "The district courts of the United States shall have *exclusive* original jurisdiction of cases or controversies *arising under this title or under regulations or orders issued thereunder,* notwithstanding the amount in controversy; except that nothing in this subsection . . . affects the power of any court of competent jurisdiction to consider, hear and determine any issue by way of defense . . . ." (Emphasis added).

In parallel fashion, § 211(b) invested TECA with *"exclusive* jurisdiction of all appeals from the district courts of the United States *in cases and controversies arising under [the ESA*]." (Emphasis added).

Although the ESA is no longer in effect, § 211(a)'s grant of exclusive original jurisdiction to the federal district courts, and § 211(b)'s grant of exclusive appellate jurisdiction to TECA, are currently applicable to cases or controversies arising under the EPAA by virtue of § 5(a)(1)(A) of that statute, 15 U.S.C. § 754(a)(1)(A). With exceptions not here relevant, that section provides:

> "[S]ections 205 through 207 and sections 209 through 211 of the Economic Stabilization Act of 1970 (as in

> effect on the day of enactment of this Act) shall apply to the regulation promulgated under section 4(a) [15 U.S.C. § 753(a)], to any order under this Act, and to any action taken by the President (or his delegate) under this Act, as if such regulation had been promulgated, such order had been issued or such action had been taken under the Economic Stabilization Act of 1970."

Applying these provisions, the Court of Appeals held below that respondents' preemption claims arose under the EPAA and, hence, were within TECA's exclusive appellate jurisdiction. (A.61-64). In so ruling, the Second Circuit reasoned as follows:

> "A major contention of the oil companies was that Section 182(12)(a) of the New York Tax Law prohibiting the passthrough of the two percent gross receipts tax was unconstitutional as a state price control rule which conflicted with the EPAA and the provision thus void under the Supremacy Clause of the United States Constitution (U.S. Const. art. IV, cl.2). To make the determination that state law conflicted with the federal regulations, as Judge McCurn found, necessitates 'a careful examination of the Federal EPAA and the Mandatory Price Regulations promulgated thereunder.' [Citation omitted.] The trial judge proceeded therefore to analyze in detail the federal statute and regulations to determine whether or not the state law was in conflict with the regulations as well as the congressional scheme and policy. [Citation omitted.] Whether that analysis was correct is not properly before this court [but rather before TECA] since in making the analysis the District Court was *clearly construing and interpreting the EPAA and its regulations.*" (A.62; emphasis added).

For precisely the reasons that the Second Circuit held that respondents' preemption claims arose under the EPAA for purposes of TECA's exclusive appellate jurisdiction under ESA § 211(b)(2), those self-same claims arose under the EPAA for

purposes of the District Court's exclusive original jurisdiction under ESA § 211(a). The parallel language of the two companion sections compels this conclusion.

Moreover, in *Gully* v. *First National Bank*, 299 U.S. 109, 112 (1936), this Court held that a claim "arises under" federal law if the right of immunity asserted by plaintiff is "such that it will be supported if the [federal law is] given one construction or effect, and defeated if [it] receive[s] another." Under that formulation, respondents' preemption claims clearly arose under the EPAA and its implementing regulations. For, as the Second Circuit found, respondents' right to relief on those claims turned on the District Court "construing and interpreting the EPAA and its regulations." (A.62).[14]

Accordingly, respondents' preemption claims were within the District Court's *exclusive* original jurisdiction under ESA § 211(a) as incorporated by reference in the EPAA. That being so, there was *no* state court remedy available to respondents—much less a plain, efficient and speedy one.[15] This constitutes an independently sufficient reason why § 1341 does not oust the federal courts of jurisdiction in this case.

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14 For the same reason, as the Second Circuit also held, respondents' preemption claims did not arise under the Constitution. (A.62-63). As this Court held in Swift & Co. v. Wickham, 382 U.S. 111, 120 (1965), the basic question in a preemption case "is never one of interpretation of the Federal Constitution but inevitably one of comparing two statutes." *Accord*, Andrews v. Maher, 525 F.2d 113, 119 (2d Cir. 1975):

> "While [the Supremacy Clause] is the reason why a state law that conflicts with a federal statute is invalid, it is the federal statute that confers whatever rights the individual is seeking to vindicate."

15 Section 1341 would not bar respondents' preemption claims here even if it were less clear that those claims are cognizable solely in federal court by reason of the exclusive jurisdiction provision of ESA § 211(a). For as long as there is a substantial question as to the applicability of § 211(a), there is a reasonable possibility that state jurisdiction is lacking, in which event it could not fairly be concluded that any remedy that might exist in the New York courts is "plain" within the meaning of § 1341. Hillsborough v. Cromwell, 326 U.S. 620, 625-26 (1946); Spector Motor Service, Inc. v. McLaughlin, 323 U.S. 101, 105-06 (1944); Garrett v. Bamford, 538 F.2d 63, 67 (3d Cir.), *cert. denied*, 429 U.S. 977 (1976).

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the Petition should be denied.

Dated: May 28, 1981

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PROOF OF SERVICE

I, Stanley D. Robinson, counsel for one of the Respondents herein, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 28th day of May 1981, I served copies of the foregoing Respondents' Joint Brief in Opposition to Petition for Writ of Certiorari, by mailing and depositing same in the United States Post Office or mail box, with first class postage prepaid, in a duly addressed envelope, to Robert Abrams, Attorney General of the State of New York, The Capitol, Albany, New York 12224. I further certify that all parties required to be served have been served.

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